Supreme Court, U.S.
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No. 99-1840

In The

Supreme Court of the United States

Carol Ann Levine

Petitioner

v.

Regents of the University of California and Reginald Zelnik

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of California

REPLY BRIEF FOR THE PETITIONER

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12 pp

Petitioner asks the Court's indulgence as she is pro se and per Haines v. Kerner 404 U.S. 519, 592 S. Ct. 594, 30 L. Ed.2 652 (1972) subject to less stringent pleading standards.

As will be demonstrated below this case involves conflict of law and Constitutional issues warranting Court action. Contrary to the Respondent's (Resp.) statement at page 1, the case is of great interest to a great many persons. E.g., Appendix F of the writ is an amicus letter submitted by the California Women's Law Center on behalf of Equal Rights Advocates, California National Organization for Women, Institute for Research for Women's Health, and Federation for Professional Women. The American Association of University Women also wrote an amicus letter to the appeal court. These organizations have a combined membership of about 800,000 people. Additionally, on behalf of each University of California (UC) campus graduate student assembly, the head of UC's United Graduate Student Assemblies repeatedly notified Petitioner (Pet.) that the assemblies believe the issue very relevant to the welfare of the 36,740 UC graduate students (statistics for academic year 1999-2000 Office of the President of UC, 6/22/00) and the hundreds of thousands and millions to follow. They have asked to be kept abreast. UC campuses currently, have more than 163,000 students, including 126,000 undergraduates, History has shown many of these can be expected to continue at UC graduate schools.

It is perhaps ironic that Resp., who accuses Pet. of "sandbagging" (although, Pet. was spoken for by attorneys in prior pleadings), next appears to try to deceive the Court. Resp. conveniently states "Indeed, this unpublished court of

appeal decision – like all such unpublished decisions - has no bearing on future cases or the development of law – and is not even citable precedent outside the confines of this dispute. See Cal. R. Ct. 977(a)."

Although, well within the allowable page limits, and realizing that it is a state statute that the Court may not be readily familiar with, Resp. conveniently fails to quote California Rule of Court 977(a) verbatim, or represent it in its entire context. That rule follows:

> "**Rule 977. Citation of Opinions**
> (a) **[Unpublished opinions]** An opinion of a Court of Appeal or an appellate department of the superior court that is not certified for publication or ordered published shall not be cited or relied on by a court or a party in any other action or proceeding **except as provided in subdivision (b).** [emphasis added]
> (b) **[Exceptions]** Such an opinion may be cited or relied on:
> (1) when the opinion is relevant under the doctrine of law of the case, res judicata, or collateral estoppel; or
> (2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding."

Thus, under Cal. R. Ct 977(a) and (b), Resp. can use this case to counter similar future complaints, which is obviously

in its favor. Conversely, a complainant will have no knowledge of it. Potentially this could further add to the already existent substantial obstacles to victims reporting sexual harassment transgressions by those with power over them in academia. (See Pet. App. F pages 3-6: pages F3, F4 were accidentally transposed with App. B, pages B3, B4.) Thus, contrary to the Resp.'s deceptive representation, it has avail to the appellate decision "outside the confines of this case." The upshot is that this decision will be used by Resp. to repress and to defend complaints. Yet it has the audacity to state and argue that this case has no impact on future cases. Conversely, bona fide plaintiffs cannot use the case.

In re Cal R Ct 977(a),(b) there is also another potentially disturbing aspect to the appellate court's tactic of not publishing this case. One apparent motive seems to have been to limit the class of potential litigants covered by California Govt Code 12940 (a)(c) and (h)(1). Unpublished decisions insulate a court's opinion from scrutiny.

In App. B at pages 5,6 the appeal court said it supported the lower court ruling of no valid causes of action for violation of the Unruh Act and FEHA because the Petitioner was "not discriminated against in the employee/applicant capacity".

At App. B, page 11 the appeal court writes:

> "We reject the notion that denying Levine's application to the graduate program constituted a refusal to select her for a 'training program leading to employment' (Govt Code, § 12940) subds (a), (c) & (h)(1), a sweeping proposition that would convert

> every student applicant into job seeker under FEHA simply because there is some potential to work at a related job while enrolled.

The appeal court continues by saying that such protection is for vocational not academic program attendees, but disregarded the fact that Pet. was in a conjoint law-history program with Boalt Law School, obviously for future employment. The law program was first contingent upon completing the Dept of History program.

At App. B, page 18, abusing discretion, and applying flawed reasoning, the appeal court writes:

> "We Have a simpler interpretation, namely that the fifth cause of action [complaint of Bane Law violation] was parasitic to the first (or first several) and that the complaint having failed to state a cause of action under the Unruh Civil Act (or FEHA), [because of what the appeal and lower court both termed as absence of employee/applicant status] necessarily failed to state a cause of action under the Banes [sic] Act."

Other than belonging to the genus Homo Sapien, no other qualification is necessary for Bane Act protection and its guarantee of rights under the US Constitution and US laws. Employee/applicant status is irrelevant.

It is disturbing that an issue like this, which the appeal court admits contains a "sweeping proposition", and

which potentially affects hundreds of thousands and future millions, is concealed from ample public attention through non-publication. It is dangerous precedent to allow a court to use such tactics, the result of which are in essence to conceal its own "sweeping" actiòns from the view of the large body of persons whom such an issue potentially directly affects and the even larger body, who are interested in such civil rights matters. The widespread effect plus XIV and I Amendment issues beckon US Supreme Court review.

Respondent at page 2 misstates the Pet.'s allegation as it appears in the Pet., at page 3. Resp. characterizes the period of sexual harassment as 20 years, beginning in the mid-1970s, whereas Pet. clearly states that sexual harassment, threats, intimidation, long term coerced unpaid labor, plagiarism, physical assaults and batteries did not begin until after 1981, well past then.

Regarding the statement of the case, contrary to Resp.'s assertion, Pet.'s background statement is a true, factual account. The appeal court's background account is inaccurate and slanted, based in large part on distorted representations of the Resp.'s pleadings. E.g., Resp. conveniently fails to properly represent the Pet.'s unregistered status in its true context.

As is explained in the Pet.'s writ at page 3, non-registered graduate student is a commonly accepted status, often employed by professors to save their students registration fees in what are often long, drawn out graduate coursework and dissertation research. (20 years or more to complete a Ph. D. degree is not unheard of or even

considered so unusual, especially for a joint degree.) "Non-registered graduate student" is an official category as noted in Appendix E, (especially at page 1 of the lodged exhibits in Appendix E, an official UC library category publication). Further support of this status is discussed at page 6 in App. F, the amicus letter representing about 800,000 persons in many state and nationwide civil rights organizations.

Furthermore, since the alleged offending professor coerced Pet. to conduct his own work (albeit unpaid and under coercion, which is analogous to the equivalent of slave labor in academia), Pet. was in a real, although unofficial, sense, a University employee. Then, Resp. at pages 2-4, presents history irrelevant to the issue, by arguing for denial of the writ, based on its representations of how Pet.'s former different and unassociated law firms presented Pet.'s State case inconsistently. Resp. mentions one attorney's failure to amend, which did occur, but over Pet.'s objection.

Respondent's reasons A. and B. why the petition should be denied are totally irrelevant to the instant issue as are the details therein presented. Resp.'s characterization of "unique allegations and inconsistencies in Petitioner's various complaints" are misconceived, and also irrelevant.

Arguendo, were the Defense's "specialized purposes" correct, per *Joshua* the alleged offending professor still specifically intended to deprive Pet. of her defined Constitutional right because she was a member of a protected class per *Bocatto*. (In re *Joshua H.* 13 Cal. App.4th 1741, (1993); . *Bocatto v. City of Hermosa Beach* 29 Cal. App.4th 1797, (1994)). I.e. Pet.'s rights were violated both under

California Civil Code (CCP) 52.1, the Bane Act and, because she was a victim of reprisal in relation to a labor dispute, under CCP 51.7, (which the Resp. controversially contends is a necessary pre-requisite for Bane Act hate crime protection). Pet. accused Zelnik of retaliating against her for exposing his role in the plagiarism of her work and exposing his intimidating, threatening and coercing practices, whereby he extracted years of unpaid labor from her for his own purposes. The other cases Resp. cites do not appear to restrict Bane Act protection to hate crimes.

Resp. does not consider that behavior and statements by the alleged offending professor indicate disdain and hate for women in general. There is a well-known, large body of literature indicating sexual harassment is an act of power and intimidation, rather than being purely sexual per se. Resp.'s assertion that hate crimes typically involve strangers, would deprive a large segment of victims of protection from such crimes by non-strangers. After all, if crime is perpetuated on the basis of sexual orientation, race, gender or ethnicity, for example, does it matter whether or not the perpetrator and victim are acquainted? If so, savvy hate crime perpetrators need only select acquaintances to technically skirt around the penalties for hate crime violations. Sexual transgressions, by their very nature, are not only against the victim, but that victim as a member of a sexual class. The two are inseparable. Sexual harassment was not against the Pet. as a person, per se, but as a woman. Were the Petitioner a male, it is doubtful this case would include sexual harassment.

But these details are really irrelevant since what the appeal court did was deprive all non-employee/non-

applicants [in which group it mistakenly included Pet.] of any Bane Act protection, whether hate crime related or not. Since the Bane Act and United States Constitution and laws, whose protections the Bane Act guarantees, protect "any individual" from a host of transgressions, the appeal court cannot legally exclude Pet. nor others from Bane Act and United States Constitution and laws protection per the XIVth Amendment, which states that no state can deny "any person ...equal protection under the laws." (See Pet.'s Question 1) Thus, arguendo, even were the Resp.'s "specialized purposes" argument correct (which is questionable considering how the Bane Act reads) and even were Pet. not to qualify as a hate crimes victim, (which she does), the appeal court cannot blanketly deprive her or anyone else of guaranteed protection against hate crimes. The core issue is plain and simple, but with vastly pervasive implications.

The Bane Act reads: "Whenever a person or persons, whether or not acting under the color of law, interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation or coercion with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States ...." The statute does not say that the Constitutional or US laws protected are limited to hate crimes, and to coin Defense's terminology -- the so-called "specialized purpose" of deterring hate crimes to the exclusion of other Constitutional and US law protections. In that case the statute might read "...rights secured by the Constitution or laws of the United States, except those whose protection is not specifically against hate crimes." That would exclude a great portion of

the Constitution and laws of the United States, and the Bane Act might have easier just listed the specific laws covered.

And as Question 2 brings forth, doesn't federal funding of the violator, in this case the UC, make the transgressions of Constitutionally protected rights all the more glaring? And as Question 3 asks, doesn't retaliation for complaint of and exposure of violation of Constitutional rights, violate free speech as guaranteed by Amendment I?

Regarding Resp.'s defense C. (Resp. at pages 7,8), the appeal court never gave Pet. an opportunity to explain what transgressions occurred from September 1994 to March 1995, nor to demonstrate the continuing pattern and practice of misconduct as it extended into that time frame. The appeal court itself, at App. B, page 17, characterized the alleged sexual harassment by quoting from the pleadings:

> "...Zelnik touching and leering at her and requesting that she put out... for him.
>
> "'In addition to numerous verbal threats against plaintiff, Zelnik also physically assaulted and battered plaintiff on numerous occasions in conjunction with defendant's verbal threats'; those threats were of ; severe and longlasting adverse repercussions if plaintiff exposed Zelnik's wrongful conduct or personal interest in and relationship with plaintiff to others.'"

Astoundingly, the appeal court did not find such acts "outrageous", or at least to pursue whether such acts

occurred during the period it was questioning. The court did not grant leave ato amend to achieve this, instead speaking in generalities about whether sexual harassment is necessarily outrageous, without knowing the specific acts referred to. Clearly the court's own characterization in quotations above reveal the outrageous nature of the conduct and make intentional infliction of emotional damages understandable.

This is another reason the case has broad implications, which can be used by the Resp. in the future. Regarding Defense D (Resp. At pages 8, 9) the appeal court did not give Petitioner leave to amend to clarify discrepancies between the pleadings of one attorney in relation to those of her then current attorney. More detrimentally to the judicial process the manner in which the appeal court handled the matter gives the message that if a new attorney attempts to honestly correct misstatements of a previous attorney, then there is a risk, or even likelihood, of case loss and that it would be in the attorney and client's interest to let misstated pleadings stand. Such a message can be fatal to proper judicial process and requires swift and unequivocal correction.

CONCLUSION

The Respondent tries to paint this case as unusual and unique. It is neither of these. It stems from an unfortunate ongoing widespread conduct, wherein academic perpetrators are shielded by respectable image and protection of the bastions of the University ivory tower. (App. F) If California cannot safeguard fundamental civil rights, Petitioner prays the US Supreme Court will.

Dated August 28, 2000

Carol Ann Levine

Carol Ann Levine,
Petitioner in Pro Per